

July 2003

MJI Publication Updates

Contempt of Court Benchbook (Revised Edition)

Crime Victim Rights Manual

Criminal Procedure Monograph 2--Issuance of Search Warrants (Revised Edition)

Criminal Procedure Monograph 5--Preliminary Examinations (Revised Edition)

Criminal Procedure Monograph 6--Pretrial Motions (Revised Edition)

Juvenile Justice Benchbook (Revised Edition)

Juvenile Traffic Benchbook

Sexual Assault Benchbook

Traffic Benchbook--Revised Edition, Volume 2

Update: Contempt of Court Benchbook (Revised Edition)

CHAPTER 5

Common Forms of Contempt of Court

5.17 Criticisms of the Court

C. Test to Determine Whether Criticism Is Contumacious

Add the following case summary at the bottom of p 70:

In *In re Contempt of Dudzinski*, ___ Mich App ___ (2003), the alleged contemnor, Dudzinski, was a spectator in the courtroom during a motion hearing in a civil lawsuit brought by the personal representative of a person fatally shot by a police officer. Dudzinski wore a shirt containing the phrase “Kourts Kops Krooks.” The trial court found that the shirt affected the fair administration of justice and ordered Dudzinski to remove it or leave the courtroom. Dudzinski refused and invoked his First Amendment right to freedom of expression. The trial court found Dudzinski in criminal contempt of court and sentenced him to 29 days in jail. Dudzinski served the full term. *Id.* at ___.

The Court of Appeals concluded that the trial court violated Dudzinski’s First Amendment right to freedom of expression by ordering him to remove the shirt or leave the courtroom because the “speech” at issue did not constitute an imminent threat to the administration of justice. *Id.* at ___, relying on *Norris v Risley*, 918 F2d 828, 832 (CA 9, 1990). The Court of Appeals distinguished the facts in this case from those in *In re Contempt of Warriner*, 113 Mich App 549 (1983), where a spectator at a bail hearing raised his fist and shouted. *Dudzinski, supra* at ___. The Court in *Dudzinski* also distinguished *Norris, supra*, where the United States Court of Appeals held that the appearance of 15 spectators wearing “Women Against Rape” buttons at the defendant’s jury trial posed an unacceptably high risk of depriving the defendant of a fair trial. *Dudzinski, supra* at ___. In *Dudzinski*, the Court of Appeals emphasized that the allegedly contumacious behavior occurred at a pretrial hearing rather than a jury trial and noted that Dudzinski was only one of three persons wearing the shirts. *Id.* at ___.

Although the Court of Appeals concluded that the trial court violated Dudzinski's constitutional rights by ordering him to remove the shirt or leave the courtroom, the Court held that the trial court did not abuse its discretion by holding Dudzinski in contempt for failing to obey its order. The Court of Appeals stated that even though "the statement on [Dudzinski's] shirt did not constitute an imminent threat to the administration of justice and was constitutionally protected speech, [Dudzinski's] willful violation of the trial court's order, regardless of its legal correctness, warranted the trial court's finding of criminal contempt." *Dudzinski, supra* at ___, citing *Kirby v Michigan High School Athletic Ass'n*, 459 Mich 23, 40 (1998), and *State Bar of Michigan v Cramer*, 399 Mich 116, 125 (1976).

Update: Crime Victim Rights Manual

CHAPTER 10

Restitution

10.5 Persons or Entities Entitled to Restitution

A. Any Victim of the Course of Conduct That Gave Rise to the Conviction or Adjudication

On page 239, add the following new subsection after subsection 2 and before Section B:

3. The Court may not order restitution to a government agency for routine costs of investigating and prosecuting crimes

Citing to the *Crigler* Court's interpretation of the applicable statute, the Court of Appeals vacated a trial court's order that the defendant pay the Barry County Sheriff's Department \$2,500.00 restitution for the costs incurred in its investigation of the defendant. *People v Newton*, ___ Mich App ___, ___ (2003). The *Newton* Court, like the *Crigler* Court, concluded that the general costs of a criminal investigation are not "direct [] financial harm" caused by a defendant's crime and thus are not expenses for which a defendant may be made to pay restitution. In *Newton*, the defendant was convicted of selling alcohol without a license from a barn on the defendant's property where parties were frequently held and informally advertised. The *Newton* Court adopted the *Crigler* Court's dicta and held that "the cost of the investigation would have been incurred without regard to whether defendant was found to have engaged in criminal activity." ___ Mich App at ___.

10.9 Calculating Restitution Where the Offense Results in Physical or Psychological Injury, Serious Bodily Impairment, or Death

C. Triple Restitution for Serious Bodily Impairment or Death of a Victim

Insert the following case summary on page 245 before the paragraph beginning with “Mental or emotional injuries . . .”:

In *Kreiner v Fischer*, ___ Mich ___ (2003), in lieu of granting leave to appeal, the Supreme Court vacated the Court of Appeals’ decision and remanded the case to the Court of Appeals with specific instructions regarding the definition of “serious impairment of a body function” and its application to the facts:

“‘Although a *serious* effect is not required, *any* effect does not suffice either. Instead, the effect must be on one’s *general* ability to lead his normal life. Because we believe that neither of the lower courts accurately addressed this issue, we remand this case to the Court of Appeals for it to consider whether plaintiff’s impairment affects his general ability to lead his normal life.’”

In *Kreiner*, uncontested evidence showed that the plaintiff sustained lower back and leg injuries in a motor vehicle collision and that the effects were likely chronic and no medical intervention could reverse the damage. Even though the trial court acknowledged that the plaintiff’s injuries were “objectively manifested” and involved an “important body function,” the court granted the defendant’s motion for summary disposition based on its conclusion that the plaintiff’s impairment was “not serious enough” to affect the plaintiff’s ability to lead a normal life. On remand, the Court of Appeals again reversed the trial court, citing the unambiguous statutory definition contained in MCL 500.3135(7) and quoting from an earlier opinion in the case:

“‘[T]he trial court ruled that as a matter of law the impairment was not “serious enough” to impinge on plaintiff’s ability to lead a normal life. This was error. The third prong of the statutory definition explicitly requires only that the impairment ‘affect[] the person’s general ability to lead his or her normal life.’” ___ Mich App at ___, quoting *Kreiner v Fischer*, 251 Mich App 513, 518 (2002).

The Court of Appeals emphasized that although the “effect” need not be serious, the statutory requirement is not satisfied by “any” effect. *Kreiner*, *supra* at ___. In reaching the same conclusion it reached when first presented with the dispute, the Court of Appeals explained:

“[O]ne’s general ability to lead his or her normal life can be affected by an injury that impacts the person’s ability to work at a job, where the job plays a significant role in that individual’s normal life Employment or one’s livelihood, for a vast majority of people, constitutes an extremely important and major part of a person’s life An injury affecting one’s employment and ability to work, under the right factual circumstances, can be equated to affecting the person’s *general* ability to lead his or her normal life.” *Kreiner, supra* at ____ (emphasis in original).

July 2003

Update: Criminal Procedure Monograph 2—Issuance of Search Warrants (Revised Edition)

2.9 Affidavits Based upon Hearsay Information

Replace the “Note” on page 18 with the following text:

The Michigan Supreme Court has held that the exclusionary rule does not apply to evidence resulting from a search warrant obtained in violation of the affidavit requirements of MCL 780.653, unless failure to apply the rule would compromise a defendant’s constitutional rights. *People v Hawkins*, ___ Mich ___, ___ (2003).

2.9 Affidavits Based upon Hearsay Information

B. Informant Must Be Credible or Information Must Be Reliable

Insert the following information at the end of Subsection B on page 19:

Even where a search warrant issued from an affidavit is later found insufficient in light of the requirements of MCL 780.653, the evidence obtained in execution of the “faulty” warrant may still be admissible against a defendant. In *People v Hawkins*, ___ Mich ___, ___ (2003), the defendant moved to suppress evidence obtained pursuant to a search warrant based on an affidavit that failed to satisfy the requirements of MCL 780.653(b) for an affiant’s reliance on unnamed sources. In deciding that the exclusionary rule did not apply to the evidence obtained in *Hawkins*, the Court overruled in part its previous rulings in *People v Sloan*, 450 Mich 160 (1995) and *People v Sherbine*, 421 Mich 502 (1984). ___ Mich at ___. According to the *Hawkins* Court:

“[W]here there is no determination that a statutory violation constitutes an error of constitutional dimensions, application of the exclusionary rule is inappropriate unless the plain language of the statute indicates a legislative intent that the rule be applied.” ___ Mich at ___.

The Court predicted that some statutory violations would be of constitutional magnitude, and the exclusionary rule would likely be appropriate to suppress evidence obtained from warrants issued on inadequate affidavits. However, the Court concluded that

“[n]othing in the plain language of §653 provides us with a sound basis for concluding that the Legislature intended that noncompliance with its affidavit requirements, standing alone, justifies application of the exclusionary rule to evidence obtained by police in reliance of a search warrant.” ___ Mich at ___.

2.13 The Exclusionary Rule and Good Faith Exception

Replace the last paragraph on page 25 with the following:

Michigan does not yet recognize a “good-faith exception to a violation of Michigan’s counterpart to the Fourth Amendment, Const 1963, art 1, §11.” *People v Scherf*, sub nom *People v Hawkins*, ___ Mich ___, ___ n 8 (2003). In *Scherf*, the Michigan Supreme Court did not address whether a good-faith exception should apply to evidence seized during a search incident to a defendant’s arrest, even though the arrest warrant was issued as a result of a petition that failed to satisfy the requirements of MCR 3.606(A). The Court observed:

“Irrespective of the application of the exclusionary rule in the context of a *constitutional* violation, the drastic remedy of exclusion of evidence does not necessarily apply to a *statutory* [or court rule] violation.” ___ Mich at ___ (emphasis in original).

According to the Court, the plain language of a court rule or statute determines whether the Legislature intended the exclusionary rule to apply to court rule and statutory violations. If no such language exists, exclusion of evidence may be proper where the statutory or court rule violation permitted discovery of evidence in violation of a defendant’s constitutional rights. ___ Mich at ___. Whether a good-faith exception should apply to evidence seized pursuant to a “faulty” warrant depends first on a determination that a rule or statutory violation from which the warrant issued was of constitutional significance. Noting that the same rules of interpretation apply to both statutes and court rules, the *Hawkins* Court held:

“[W]here there is no determination that a statutory violation constitutes an error of constitutional dimensions, application of the exclusionary rule is inappropriate unless the plain language of the statute indicates a legislative intent that the rule be applied.” ___ Mich at ___.

In *People v Scherf*, *supra*, the defendant was arrested after his probation officer petitioned the court for an arrest warrant when the defendant failed to comply with the terms of his probation. The defendant claimed the arrest warrant was invalid (and the evidence seized incident to the arrest should be suppressed) because the probation officer’s petition failed to satisfy the affidavit requirement of MCR 3.606(A), the court rule governing contempt proceedings for violations occurring outside the court’s presence. The Court concluded that nothing in MCR 3.606(A)’s plain language indicated that the the exclusionary rule was intended to apply to violations of the court rule’s affidavit requirement.

Whether Michigan will adopt some version of a good-faith exception to the exclusionary rule may be decided in *People v Goldston*, 467 Mich 938 (2003). In *Goldston*, the Court granted leave to “consider whether to adopt and apply a good-faith exception to the exclusionary rule.” ____ Mich at ____ n 8.

Update: Criminal Procedure Monograph 5—Preliminary Examinations (Revised Edition)

5.5 Scope of Preliminary Examinations

A. Probable Cause Standard

Insert the following case summary on page 8 at the end of subsection A:

In *People v Perkins*, ___ Mich ___, ___ (2003), the Michigan Supreme Court reversed the Court of Appeals' ruling that reinstated the defendant's CSC-I charge. *Perkins* involved a 16-year-old girl (complainant) and a Bay County Sheriff (defendant). The complainant and the defendant had been acquainted for four years during which time a sexual relationship developed between them. The complainant often babysat the defendant's children, attended church with the defendant's family, and for a time resided with the defendant's family, and the defendant's wife coached the complainant's basketball team.

In *Perkins*, the Michigan Supreme Court emphasized the standard by which preliminary examination evidence is to be measured before satisfying the quantum necessary to bind a defendant over for trial. The Court reiterated several well-established guidelines for conducting a proper preliminary examination. The prosecutor need not establish a defendant's guilt beyond a reasonable doubt at the preliminary exam stage, but a defendant cannot be bound over if the prosecutor has failed to present evidence on each element of the charged offense. The evidence presented need not convince the presiding magistrate of the defendant's guilt; doubt is properly resolved by the trier of fact provided the prosecutor has established probable cause that the defendant committed a crime. Conviction of a CSC-I charge requires proof of force or coercion.

In contrast to the Court of Appeals, the Michigan Supreme Court found that the prosecutor did not present evidence of coercion:

“As an authority figure, defendant had engaged the complainant in continuing sexual conduct beginning when she was much younger. The prosecutor reasoned that

defendant thus established a pattern of abuse that eroded the complainant's ability to resist his sexual advances during the incident in question." ____ Mich at ____.

The Supreme Court dismissed the defendant's CSC-I charge because "the record shows that no evidence was presented at the preliminary hearing to support the prosecutor's assertion that the complainant was coerced, in any sense of that term, to fellate defendant on the occasion in question." ____ Mich at ____.

Update: Criminal Procedure Monograph 6—Pretrial Motions (Revised Edition)

6.14 Motion to Determine Defendant's Competency to Stand Trial

7. Maintaining the Defendant's Competence Through the Use of Psychotropic Drugs

Insert the following case summary on page 22 immediately before the beginning of Section 6.15:

In limited circumstances, the United States Constitution “permits the Government to administer antipsychotic drugs involuntarily to a mentally ill criminal defendant — in order to render that defendant competent to stand trial for serious, but nonviolent, crimes.” *Sell v United States*, ___ US ___, ___ (2003). The Supreme Court framed the issue in *Sell* as follows:

“Does forced administration of antipsychotic drugs to render [the defendant] competent to stand trial unconstitutionally deprive him of his ‘liberty’ to reject medical treatment?” ___ US at ___.

The *Sell* Court’s decision was guided by two previous Supreme Court cases involving administering drugs to an inmate against the inmate’s will. In *Washington v Harper*, 494 US 210, 221 (1990), the United States Supreme Court recognized that an individual possesses a “‘significant’ and constitutionally protected ‘liberty interest’ in avoiding the unwanted administration of antipsychotic drugs.” However, forced administration in *Harper* was justified by “legitimate” and “important” state interests, including the constitutionally sound state interest of treating a prison inmate with serious mental illness who poses a danger to himself or others, when that treatment is in the inmate’s best medical interests. ___ US at ___. In *Riggins v Nevada*, 504 US 127, 134-135 (1992), the Court indicated that only an “essential” or “overriding” state interest could overcome an individual’s constitutional right to decline the administration of antipsychotic drugs. The *Riggins* Court cautioned that an analysis of the competing interests (the defendant’s right to deny medication and the state’s interest) must include

determinations that the medication was “medically appropriate” and “essential” to the safety of the defendant or others. ____ US at ____.

On the facts of the *Sell* case, where the defendant’s offenses were primarily nonviolent, but where the defendant verbally threatened to harm a specific individual, the *Sell* Court held:

“[T]he Constitution permits the Government involuntarily to administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial, but only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests.” ____ US at ____.

The *Sell* Court predicted that cases permitting the forced administration of antipsychotic medication *solely* for trial-competence purposes would be rare due to the government’s high burden of proof to justify medication solely for the sake of the defendant’s competence to stand trial. The Court suggested that alternative grounds in support of forced drug administration (health and safety issues, potential for harming self or others, etc.) be explored before attempting to obtain permission on the basis of the defendant’s competence to stand trial. ____ Mich at ____.

6.20 Motion for Substitution of Counsel for Defendant or Motion to Withdraw as Counsel for Defendant

Insert the following case summary before Section 6.21 on page 40:

A defendant's Sixth Amendment right to counsel includes the defendant's right to retain the counsel of his or her choice, even when the defendant's primary counsel wishes to join co-counsel from outside the state on a *pro hac vice* basis. *People v Fett*, ___ Mich App ___, ___ (2003). In *Fett*, the defendant was charged with OUIL or UBAL. Because the defendant had two prior alcohol-related convictions within the past ten years, conviction of either of the charges or the lesser-included offense of OWI would result in a felony conviction. ___ Mich App at ___.

Commenting that “[i]t is a simple OUIL case, and I am sure [defendant's Michigan counsel] has tried many cases on OUIL,” the trial court denied the defendant's timely request to admit *pro hac vice* an attorney licensed in Ohio to assist the defendant's Michigan attorney at trial. ___ Mich App at ___. The Michigan Court of Appeals reversed the trial court's ruling and held that “a trial court may not arbitrarily and unreasonably refuse to grant admission *pro hac vice* of an otherwise qualified out-of-jurisdiction attorney.” ___ Mich App at ___. The Court further held that the trial court's denial of the defendant's request was a structural and constitutional error mandating automatic reversal. ___ Mich App at ___.

6.28 Motion to Suppress the Fruits of Illegal Police Conduct

Insert the following language after the first paragraph on page 64:

In *People v Clay*, ___ Mich ___, ___ (2003), the Michigan Supreme Court upheld the defendant’s conviction of assaulting a corrections officer, even though the conviction for which the defendant was imprisoned at the time of the assault was later overturned. Because on appeal the evidence on which his initial conviction was based was suppressed as the fruit of an unconstitutional traffic stop and subsequent search, the defendant argued he was not “lawfully imprisoned” as required by the plain language of the statute penalizing assaults on corrections officers. The Supreme Court framed the issue simply:

“The issue presented is whether the reversal of defendant’s conviction of the concealed-weapon offense, effectuated by an application of the exclusionary rule, means that defendant was not ‘lawfully imprisoned’ as contemplated by MCL 750.197c.” ___ Mich at ___.

In affirming the defendant’s assault conviction, the Court discussed the scope of a police officer’s statutory authority to arrest a person who commits a felony in the officer’s presence. In *Clay*, the police officer observed the defendant with a concealed weapon for which he had no permit; therefore, the officer was authorized to arrest and imprison the defendant on that basis. According to the *Clay* Court,

“[A] subsequent determination concerning a defendant’s prosecution cannot and does not serve to retroactively render ‘unlawful’ the actions of a law enforcement officer where those actions are authorized by law.

“Rather, for purposes of MCL 750.197c, an imprisonment cannot be *unlawful* where a law enforcement officer has been given the authority under law to imprison the individual. Because defendant was detained pursuant to the officer’s legal authority under MCL 764.15(1)(a), he was ‘lawfully imprisoned’ under MCL 750.197c.” ___ Mich at ___ (emphasis in original).

6.36 Motion to Suppress Evidence Seized Pursuant to a Defective Search Warrant

Insert the following case summary on page 87 immediately before Section 6.37:

In a consolidated appeal involving evidentiary issues arising from the execution of a bench warrant in one case and the execution of a search warrant in the other, the Michigan Supreme Court held that the exclusionary rule does not apply to evidence obtained as a result of statutory and court rule violations having no constitutional implications.

In *People v Hawkins*, ___ Mich ___, ___ (2003), the defendant moved to suppress evidence obtained pursuant to a search warrant based on an affidavit that failed to satisfy the statutory requirements of MCL 780.653(b) for an affiant's reliance on unnamed sources. In deciding that the exclusionary rule did not apply to the evidence obtained in *Hawkins*, the Court overruled in part its previous ruling in *People v Sloan*, 450 Mich 160 (1995), the case on which the Court of Appeals relied in its disposition of the case. In *Sloan*, the "Court held that evidence obtained under a search warrant issued in violation of §653 must be suppressed," and the Court of Appeals affirmed the trial court's order suppressing the proceeds of the search warrant ___ Mich at ___. The *Hawkins* Court disagreed with the earlier *Sloan* analysis and held:

"[W]here there is no determination that a statutory violation constitutes an error of constitutional dimensions, application of the exclusionary rule is inappropriate unless the plain language of the statute indicates a legislative intent that the rule be applied." ___ Mich at ___.

The Court predicted that some statutory violations would be of constitutional magnitude, and the exclusionary rule would likely be appropriate to suppress any evidence obtained from warrants issued on inadequate affidavits. However, the Court concluded that

"[n]othing in the plain language of §653 provides us with a sound basis for concluding that the Legislature intended that noncompliance with its affidavit requirements, standing alone, justifies application of the exclusionary rule to evidence obtained by police in reliance of a search warrant." ___ Mich at ___.

In *People v Scherf*, sub nom *People v Hawkins*, ___ Mich ___, ___ (2003), the defendant was arrested after his probation officer petitioned the court for an arrest warrant when the defendant failed to comply with the terms of his probation. The defendant claimed the arrest warrant was invalid (and the evidence seized incident to the arrest should be suppressed) because the probation officer's petition failed to satisfy the affidavit requirement of MCR

3.606(A), the court rule governing contempt proceedings for violations occurring outside the court's presence.

The Court reached the same decision in *Scherf* as it did in *Hawkins*, and for the same reasons. The Court concluded that nothing in MCR 3.606(A)'s plain language indicates that the exclusionary rule was intended to apply to violations of the court rule's affidavit requirement.

Update: Juvenile Justice Benchbook (Revised Edition)

CHAPTER 7

Pretrial Proceedings in Delinquency Cases

7.8 Evaluating a Juvenile's Competence

Insert the following case summary on p 164 immediately before the beginning of Section 7.9:

In limited circumstances, the United States Constitution “permits the Government to administer antipsychotic drugs involuntarily to a mentally ill criminal defendant — in order to render that defendant competent to stand trial for serious, but nonviolent, crimes.” *Sell v United States*, ___ US ___, ___ (2003). The Supreme Court framed the issue in *Sell* as follows:

“Does forced administration of antipsychotic drugs to render [the defendant] competent to stand trial unconstitutionally deprive him of his ‘liberty’ to reject medical treatment?” ___ US at ___.

The *Sell* Court’s decision was guided by two previous Supreme Court cases involving administering drugs to an inmate against the inmate’s will. In *Washington v Harper*, 494 US 210, 221 (1990), the United States Supreme Court recognized that an individual possesses a “‘significant’ and constitutionally protected ‘liberty interest’ in avoiding the unwanted administration of antipsychotic drugs.” However, forced administration in *Harper* was justified by “legitimate” and “important” state interests, including the constitutionally sound state interest of treating a prison inmate with serious mental illness who poses a danger to himself or others, when that treatment is in the inmate’s best medical interests. ___ US at ___. In *Riggins v Nevada*, 504 US 127, 134-135 (1992), the Court indicated that only an “essential” or “overriding” state interest could overcome an individual’s constitutional right to decline the administration of antipsychotic drugs. The *Riggins* Court cautioned that an analysis of the competing interests (the defendant’s right to deny medication and the state’s interest) must include determinations that the medication was “medically appropriate” and “essential” to the safety of the defendant or others. ___ US at ___.

On the facts of the *Sell* case, where the defendant's offenses were primarily nonviolent, but where the defendant verbally threatened to harm a specific individual, the *Sell* Court held:

“[T]he Constitution permits the Government involuntarily to administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges in order to render that defendant competent to stand trial, but only if the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests.” ____ US at ____.

The *Sell* Court predicted that cases permitting the forced administration of antipsychotic medication *solely* for trial-competence purposes would be rare due to the government's high burden of proof to justify medication solely for the sake of the defendant's competence to stand trial. The Court suggested that alternative grounds in support of forced drug administration (health and safety issues, potential for harming self or others, etc.) be explored before attempting to obtain permission on the basis of the defendant's competence to stand trial. ____ Mich at ____.

CHAPTER 10

Juvenile Dispositions

10.12 Restitution

E. Persons or Entities Entitled to Restitution

Add the following new subsection on the top of p 239:

The Court may not order restitution to a government agency for routine costs of investigating and prosecuting crimes. Citing to the *Crigler* Court's interpretation of the applicable statute, the Court of Appeals vacated a trial court's order that the defendant pay the Barry County Sheriff's Department \$2,500.00 restitution for the costs incurred in its investigation of the defendant. *People v Newton*, ___ Mich App ___, ___ (2003). The *Newton* Court, like the *Crigler* Court, concluded that the general costs of a criminal investigation are not "direct [] financial harm" caused by a defendant's crime and thus are not expenses for which a defendant may be made to pay restitution. In *Newton*, the defendant was convicted of selling alcohol without a license from a barn on the defendant's property where parties were frequently held and informally advertised. The *Newton* Court adopted the *Crigler* Court's dicta and held that "the cost of the investigation would have been incurred without regard to whether defendant was found to have engaged in criminal activity." ___ Mich App at ___.

CHAPTER 10

Juvenile Dispositions

10.12 Restitution

I. Calculating Restitution Where the Offense Results in Physical or Psychological Injury, Serious Bodily Impairment, or Death

Insert the following case summary on p 244 before the paragraph beginning with “Mental or emotional injuries . . .”:

In *Kreiner v Fischer*, ___ Mich ___ (2003), in lieu of granting leave to appeal, the Supreme Court vacated the Court of Appeals’ decision and remanded the case to the Court of Appeals with specific instructions regarding the definition of “serious impairment of a body function” and its application to the facts:

“‘Although a *serious* effect is not required, *any* effect does not suffice either. Instead, the effect must be on one’s *general* ability to lead his normal life. Because we believe that neither of the lower courts accurately addressed this issue, we remand this case to the Court of Appeals for it to consider whether plaintiff’s impairment affects his general ability to lead his normal life.’”

In *Kreiner*, uncontested evidence showed that the plaintiff sustained lower back and leg injuries in a motor vehicle collision and that the effects were likely chronic and no medical intervention could reverse the damage. Even though the trial court acknowledged that the plaintiff’s injuries were “objectively manifested” and involved an “important body function,” the court granted the defendant’s motion for summary disposition based on its conclusion that the plaintiff’s impairment was “not serious enough” to affect the plaintiff’s ability to lead a normal life. On remand, the Court of Appeals again reversed the trial court, citing the unambiguous statutory definition contained in MCL 500.3135(7) and quoting from an earlier opinion in the case:

“‘[T]he trial court ruled that as a matter of law the impairment was not “serious enough” to impinge on plaintiff’s ability to lead a normal life. This was error. The third prong of the statutory definition explicitly requires only that the impairment ‘affect[] the person’s general ability to lead his or her normal life.’” ___ Mich App at ___, quoting *Kreiner v Fischer*, 251 Mich App 513, 518 (2002).

The Court of Appeals emphasized that although the “effect” need not be serious, the statutory requirement is not satisfied by “any” effect. *Kreiner*,

supra at _____. In reaching the same conclusion it reached when first presented with the dispute, the Court of Appeals explained:

“[O]ne’s general ability to lead his or her normal life can be affected by an injury that impacts the person’s ability to work at a job, where the job plays a significant role in that individual’s normal life Employment or one’s livelihood, for a vast majority of people, constitutes an extremely important and major part of a person’s life An injury affecting one’s employment and ability to work, under the right factual circumstances, can be equated to affecting the person’s *general* ability to lead his or her normal life.” *Kreiner, supra* at ____ (emphasis in original).

Update: Juvenile Traffic Benchbook

CHAPTER 9

Elements of Selected Criminal Traffic Offenses

9.10 Failing to Stop at Signal of Police Officer (“Fleeing and Eluding”)

Insert the following case summary on page 9–19 after the second paragraph in subsection “D. Issues”:

Fleeing and eluding is not a specific-intent crime; therefore, a defendant cannot raise intoxication as a defense to a charge of fleeing and eluding. *People v Abramski*, ___ Mich App ___, ___ (2003). In *Abramski*, the defendant was convicted by jury of four charges, including fleeing and eluding and operating a motor vehicle while under the influence. The defendant argued that the statutory language prohibiting the conduct of fleeing and eluding expressly requires that a driver *willfully* fail to obey a police officer’s direction. According to the defendant, the inclusion of the word “willfully” in the statutory language indicated that more than general intent was required to constitute a violation. The Court of Appeals disagreed and reasoned that “‘where the knowledge element of an offense is necessary simply to prevent innocent acts from constituting crimes,’” the “knowledge” or “willful” element of the statute is only a general intent requirement. ___ Mich App at ___, quoting *People v Karst*, 138 Mich App 413, 416 (1984).

Having concluded that the fleeing and eluding statute does not require that an individual intend that his or her conduct cause or result in a specific consequence beyond fleeing and eluding, the defendant could not raise intoxication as a defense. “[V]oluntary intoxication is not a defense to a general intent crime.” ___ Mich App at ___.

Update: Sexual Assault Benchbook

CHAPTER 2

The Criminal Sexual Conduct Act

2.5 Terms Used in the CSC Act

I. “Force or Coercion”

Insert the following case summary before the partial paragraph at the bottom of page 75:

In *People v Perkins*, ___ Mich ___, ___ (2003), the Michigan Supreme Court reversed the Court of Appeals’ ruling that reinstated the defendant’s CSC–I charge. *Perkins* involved a 16-year-old girl (complainant) and a Bay County Sheriff (defendant). The complainant and the defendant had been acquainted for four years during which time a sexual relationship developed between them. The complainant often babysat the defendant’s children, attended church with the defendant’s family, and for a time resided with the defendant’s family, and the defendant’s wife coached the complainant’s basketball team. The Michigan Supreme Court held that the prosecutor failed to present evidence of coercion sufficient to bind the defendant over for trial.

The Michigan Supreme Court stated the following regarding the prosecutor’s theory of coercion:

“As an authority figure, defendant had engaged the complainant in continuing sexual conduct beginning when she was much younger. The prosecutor reasoned that defendant thus established a pattern of abuse that eroded the complainant’s ability to resist his sexual advances during the incident in question.” ___ Mich at ___.

The Supreme Court dismissed the defendant’s CSC–I charge because “the record shows that no evidence was presented at the preliminary hearing to support the prosecutor’s assertion that the complainant was coerced, in any sense of that term, to fellate defendant on the occasion in question.” ___ Mich at _____. However, because of the lack of evidence presented, the Court found

it unnecessary “to reach the question whether psychological subjugation is a viable theory on which to rest a charge of CSC-I.” ____ Mich at ____.

2.6 Lesser-Included Offenses Under CSC Act

B. Applicable Statute and Three-Part Test

Insert the following case summary on page 110 immediately before the beginning of Subsection C:

In *People v Mendoza*, ___ Mich ___, ___ (2003), the Michigan Supreme Court ruled that both voluntary and involuntary manslaughter are necessarily lesser-included offenses of murder; therefore, manslaughter is an inferior offense of murder as contemplated by MCL 768.32. Provided a rational view of the evidence supports an instruction on the inferior offense, a defendant is entitled to such instruction. In reaching this decision, the Court was obligated to overrule *People v Van Wyck*, 402 Mich 266 (1978), and its progeny to the extent those opinions held otherwise. ___ Mich at ___.

Although *Mendoza* may not directly impact or apply to many CSC cases, the opinion is instructive in its detailed review of *Cornell*, *supra*, and its discussion of necessarily lesser-included, cognate lesser-included, and inferior offenses. The *Mendoza* Court emphasized the requirement that a rational view of the evidence must support an instruction on the lesser-included or inferior offense. When a rational view of the evidence does not support giving the instruction, it is not error for the court to deny a defendant's request for it. ___ Mich at ___.

CHAPTER 5

Bond and Discovery

5.14 Discovery in Sexual Assault Cases

B. Discovery Rights

1. Generally

Insert the following case summary at the end of the text on page 270:

A trial judge may not compel a party in a criminal case to generate a report for its expert witness when no such report exists. *People v Phillips*, ___ Mich ___, ___ (2003). MCR 6.201(A), by its plain and unambiguous language, applies only to already-existing reports.

In *Phillips*, the defendant was charged with second-degree murder after a single vehicle accident killed the passenger in the car the defendant was driving. The defendant retained three expert witnesses for trial, and the prosecutor requested discovery of the experts' reports. No reports then existed, and the prosecutor moved to strike the defendant's experts "on the basis that defendant had not turned over all reports or curricula vitae of the experts." ___ Mich at ___. The trial court ordered the defendant to comply with the prosecutor's request, and the prosecutor again moved to strike the witnesses. The trial court then ordered the defendant to "obtain reports from the defense expert and provide them within thirty (30) days, to the People." The court denied the defendant's motion for reconsideration and indicated that it had discretion to order the creation of such reports under MCL 767.94a and MCR 6.201.

On leave granted, the Court of Appeals reversed the trial court and held that no language in MCR 6.201 required an expert to create a written report to produce in response to a party's discovery request. The Court also rejected the trial court's assertion that it had good cause to modify the rule's requirements and prohibitions and was entitled to do so under MCR 6.201(I). On remand from the Michigan Supreme Court, the trial court failed to establish good cause sufficient to invoke the authority to modify the court rule. The Supreme Court affirmed the Court of Appeals and reasoned that a party cannot be obligated to disclose reports that do not exist at the time of the discovery request. The Court further stated:

"We recognize that there may be circumstances where good cause does exist to permit a trial court to compel a party to create expert witness reports. For example, good cause may exist when a trial court believes a party is intentionally suppressing reports by an expert witness." ___ Mich at ___.

Update: Traffic Benchbook— Revised Edition, Volume 2

Part I—Vehicle Code §625 and §904

CHAPTER 2

Procedures in Drunk Driving and DWLS Cases

2.2 Police Authority to Arrest Without a Warrant

E. Defendant Rights at Arrest

2. Sixth Amendment Right to Counsel

Insert the following language at the end of the information contained in subsection 2 on page 2–9:

A defendant's Sixth Amendment right to counsel includes the defendant's right to retain the counsel of his or her choice, even when the defendant's primary counsel wishes to join co-counsel from outside the state on a *pro hac vice* basis. *People v Fett*, ___ Mich App ___, ___ (2003). In *Fett*, the defendant was charged with OUIL or UBAL. Because the defendant had two prior alcohol-related convictions within the past ten years, conviction of either of the charges or the lesser-included offense of OWI would result in a felony conviction. ___ Mich App at ___.

Commenting that “[i]t is a simple OUIL case, and I am sure [defendant's Michigan counsel] has tried many cases on OUIL,” the trial court denied the defendant's timely request to admit *pro hac vice* an attorney licensed in Ohio to assist the defendant's Michigan attorney at trial. ___ Mich App at ___. The Michigan Court of Appeals reversed the trial court's ruling and held that “a trial court may not arbitrarily and unreasonably refuse to grant admission *pro hac vice* of an otherwise qualified out-of-jurisdiction attorney.” ___ Mich App at ___. The Court further held that the trial court's denial of the defendant's request was a structural and constitutional error mandating automatic reversal. ___ Mich App at ___.

Part II—Felony Traffic Offenses

CHAPTER 7

Felony Offenses in the Michigan Vehicle Code

7.4 Failing to Stop at Signal of Police Officer (“Fleeing and Eluding”)

Insert the following case summary on page 7–11 at the end of subsection “E. Issues”:

Fleeing and eluding is not a specific-intent crime; therefore, a defendant cannot raise intoxication as a defense to a charge of fleeing and eluding. *People v Abramski*, ___ Mich App ___, ___ (2003). In *Abramski*, the defendant was convicted by jury of four charges, including fleeing and eluding and operating a motor vehicle while under the influence. The defendant argued that the statutory language prohibiting the conduct of fleeing and eluding expressly requires that a driver *willfully* fail to obey a police officer’s direction. According to the defendant, the inclusion of the word “willfully” in the statutory language indicated that more than general intent was required to constitute a violation. The Court of Appeals disagreed and reasoned that “‘where the knowledge element of an offense is necessary simply to prevent innocent acts from constituting crimes,’” the “knowledge” or “willful” element of the statute is only a general intent requirement. ___ Mich App at ___, quoting *People v Karst*, 138 Mich App 413, 416 (1984).

Having concluded that the fleeing and eluding statute does not require that an individual intend that his or her conduct cause or result in a specific consequence beyond fleeing and eluding, the defendant could not raise intoxication as a defense. “[V]oluntary intoxication is not a defense to a general intent crime.” ___ Mich App at ___.